No. 94-560

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In The

Supreme Court of the United States

October Term, 1994

FIRST OPTIONS OF CHICAGO, INC.,

Petitioner,

vs.

MANUEL KAPLAN, CAROL KAPLAN and M.K. INVESTMENTS, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Where the parties did not clearly and unmistakably agree that the question of arbitrability was for the arbitrators and not for the courts, did the Court of Appeals properly review *de novo* the arbitrators' assertion of jurisdiction over the controversy?

2. Where the district court essentially granted summary judgment on a stipulated record, did the Court of Appeals properly review *de novo* the district court's decision denying a petition to vacate an arbitration award for want of arbitral jurisdiction?

3. Where the express agreements of the parties not only failed to provide evidence of consent to arbitrate, but in fact negated consent to arbitrate, did the Court of Appeals properly find that Philadelphia Stock Exchange rules alone did not suffice to create arbitral jurisdiction over "associated persons" of exchange members?

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent M.K. Investments, Inc. ("MKI") was an options market maker on the Philadelphia Stock Exchange from 1984 until January 1989. Respondent Manuel Kaplan was the president and, since 1986, the sole shareholder of MKI. Respondent Carol Kaplan is Manuel Kaplan's wife. Petitioner First Options of

Chicago, Inc. ("First Options" or "Petitioner") was MKI's clearinghouse. App. A at 4-5.

In October 1987, as a result of the largest percentage drop in stock exchange history, MKI's trading account lost a $10 million positive balance almost overnight. The net equity in the MKI trading account went from $10.6 million on October 14, 1987 to *negative* $2.1 million on October 19, 1987. App. A at 5.

First Options took control of the MKI account and proceeded to liquidate all of MKI's positions. In the course of that liquidation, First Options decreased the value of the MKI account to *negative* $5.1 million. App. A at 5-6. MKI, the Kaplans, and First Options entered into settlement negotiations regarding that negative balance. On March 24, 1988, they executed a 4-contract, 28-page settlement/workout agreement, which detailed the parties' rights and liabilities. App. A at 6.

Because certain aspects of the workout agreement were applicable only to certain parties, the agreement consisted of four separate contracts, each signed by different parties. Critically, only one of the four contracts (the MKI Subordinated Loan Agreement) contained an arbitration clause, *and that contract was signed only by First Options and MKI, and not by Manuel or Carol Kaplan.* Manuel and Carol Kaplan signed only one of the four contracts (the Letter Agreement), and that contract *did not contain an arbitration clause.* App. A at 6-7.

In June 1989, First Options filed a Statement of Claim with the Philadelphia Stock Exchange ("the Exchange"), alleging that Respondents had breached the workout agreement and seeking an arbitration award against the Respondents. MKI and First Options (*but neither Manuel nor Carol Kaplan*) signed a submission agreement, presenting this case to the Exchange for arbitration. Manuel and Carol Kaplan *refused* to sign any submission

agreement, and instead formally and timely objected to Exchange jurisdiction. App. A at 10-11, 18.

On February 26, 1990, the Exchange conducted a pre-hearing discovery conference. The Kaplans' counsel withdrew their jurisdictional objections from consideration at that conference, and the arbitrators therefore made no mention of the jurisdictional issue in their February 26, 1990 discovery ruling. The case then lay dormant for the next 22 months. For almost two years, no discovery took place, no motions were filed, and no rulings were issued. App. A at 11.

In December 1991, the Kaplans engaged new counsel. On January 6, 1992, Manuel and Carol Kaplan filed a motion to dismiss for lack of jurisdiction. The arbitrators denied the motion to dismiss on January 14, 1992. *Id.*

On June 5, 1992, the arbitrators issued an award requiring MKI and Manuel Kaplan, jointly and severally, to pay First Options $5,662,188 plus interest, and requiring Manuel and Carol Kaplan, jointly and severally, to pay First Options $346,342 plus interest. App. A at 12. Respondents timely filed a petition to vacate the arbitration award, and First Options filed a cross-petition to confirm the award.

In an unpublished memorandum and order entered September 25, 1992, the district court confirmed the arbitration award. The court held that Manuel and Carol Kaplan had consented to arbitration by virtue of the arbitration clause in the Subordinated Loan Agreement, even though neither Manuel nor Carol Kaplan had signed the Subordinated Loan Agreement. Alternatively, the court held that the Kaplans' former counsel's participation in the 1990 discovery conference had waived their jurisdictional objections. App. A at 12. Respondents timely appealed the district court's decision.

On March 31, 1994, in a unanimous Opinion reported at 19 F.3d 1503 (3d Cir. 1994), the Court of Appeals affirmed the district court's judgment as to MKI, but reversed the judgment as to Manuel and Carol Kaplan, holding that the arbitrators lacked jurisdiction over the Kaplans. App. A at 3-4. On June 29, 1994, the Court of Appeals denied First Options' Petition for Rehearing with Suggestion for Rehearing In Banc. App. B at 1-2.

In its unanimous Opinion, the Court of Appeals held: (a) that it would review *de novo* the district court's denial of Respondents' petition to vacate the arbitration award, App. A at 13; (b) that the Kaplans had not waived their jurisdictional objections, App. A at 17-21; (c) that because arbitrability is a question for the court to decide, the arbitrators' assertion of jurisdiction over the Kaplans was not entitled to deference, App. A at 22-23; (d) that the arbitrators lacked jurisdiction over the Kaplans, App. A at 3-4; and (e) that the evidence was insufficient to allow the piercing of MKI's corporate veil to impose $5,662,188 in personal liability upon Mr. Kaplan, App. A at 52.

SUMMARY OF ARGUMENT

In *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649 (1986), this Court held that "[t]he question of arbitrability . . . is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." The standard set forth by this Court in *AT&T Technologies* is *the* standard for determining when courts should independently decide arbitrability; there is no conflict among the Circuits on this issue. Petitioner's purported conflict among the Circuits is in reality simply a disagreement with the Court of Appeals' correct application of this settled standard to the facts of this case. Because this Court has already provided sufficient guidance concerning when courts should independently

determine arbitral jurisdiction, First Options' petition for certiorari should be denied.

The district court evaluated the parties' respective petitions to vacate or confirm the arbitration award based on the arbitration record and stipulated facts. The court held no evidentiary hearing and made no credibility determinations. The proceeding was highly analogous to the consideration of cross-motions for summary judgment. Therefore, the Court of Appeals properly reviewed the district court's decision to confirm the arbitration award *de novo*, applying the same standard the district court should have used. The *de novo* standard, which is applied in at least nine of the Circuits, provides appropriate deference to the arbitrators and best comports with the summary nature of the proceedings before the district court. Therefore, this Court should deny Petitioner's request that it grant certiorari to adopt a dual standard of review that would provide for *de novo* review of district court decisions vacating arbitration awards and abuse-of-discretion review of decisions denying vacatur.

The Court of Appeals held that where, as here, the parties' agreements and conduct plainly negate consent to arbitrate, stock exchange rules alone do not confer arbitral jurisdiction over "associated persons" of Exchange members. That holding followed logically from the axiom that "arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration." *AT&T Technologies*, 475 U.S. at 648-49. Here, the parties' agreements and conduct clearly demonstrate that the Kaplans did not agree to arbitrate their dispute over the workout agreement with First Options. Because the Court of Appeals' holding on this issue was exceedingly narrow, fact-bound, and eminently reasonable, this Court should deny certiorari.

REASONS FOR DENYING THE WRIT

I.

THIS COURT'S PRIOR DECISIONS ALREADY DELINEATE WHEN FEDERAL COURTS SHOULD INDEPENDENTLY DETERMINE ARBITRAL JURISDICTION.

In *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643 (1986), this Court, in a unanimous decision, delineated the circumstances in which courts should independently determine arbitral jurisdiction:

> [T]he question of arbitrability ... is undeniably an issue for *judicial* determination. Unless the parties *clearly and unmistakably* provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.

Id. at 649 (emphasis added). *See also, id.* at 647 ("issue of arbitrability is for the courts to decide unless the parties stipulate otherwise"). This rule "follows inexorably" from the principle that " 'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' " *Id.* at 648 (*quoting United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)).

The standard set forth in *AT&T Technologies* is *the* standard for determining when courts should independently decide the question of arbitrability; there is no conflict among the Circuits on this issue. Petitioner claims to see such a conflict among the Circuits; in reality, Petitioner simply disagrees with the Court of Appeals' correct application of settled law to the facts of this case. The Court of Appeals held, based on stipulated facts, that the

parties had not clearly and unmistakably provided that the question of arbitrability was for the arbitrators rather than the courts, and therefore the court appropriately made an independent determination of arbitrability.

The decisions of the United States Court of Appeals for the First Circuit cited by Petitioner at footnote 6 of its Petition are particularly illustrative of the absence of any conflict among the Circuits as to the applicable legal standard. In *Mobil Oil Corp. v. Local 8-766, Oil, Chem. & Atomic Workers Int'l Union*, 600 F.2d 322 (1st Cir. 1979), the employer maintained before the arbitrator that the dispute was not arbitrable, while the Union argued that it was arbitrable. *Id.* at 323-24. The arbitrator agreed with the Union that the dispute was arbitrable and found for the Union on the merits. *Id.* at 324. The employer moved to vacate the arbitrator's award, and the district court denied the motion. On appeal, the United States Court of Appeals for the First Circuit held that the district court had erred by failing to review *de novo* the arbitrator's determination of arbitrability. *Id.* at 325. Thus, even though the parties had argued the arbitrability issue before the arbitrator, and the arbitrator had decided the issue, the Court of Appeals held that the district court should have decided the arbitrability question *independently. Id.*

First Options cites *Local 369, Utility Workers Union v. Boston Edison Co.*, 752 F.2d 1 (1st Cir. 1984), for the proposition that the First Circuit reviews with deference an arbitrator's determination of arbitrability. In that case, however, "[t]he parties *agreed* to submit to the arbitrator only the question of jurisdiction." *Id.* at 2 (emphasis added). The court held that "'where the parties had agreed, by contract or post-dispute stipulation, to submit the issue of arbitrability to arbitration,'" a deferential standard of review applied. *Id.* at 3 (quoting district court opinion). Here, in marked contrast, the Kaplans did not agree to submit any question to the arbitrators for final decision.

As it was in *Local 369*, the issue of arbitrability is often submitted to an arbitrator by *agreement* of the parties — *i.e.*, the parties sign a submission agreement listing arbitrability as an issue to be decided by the arbitrator. In such cases, deferential review may be appropriate under *AT&T Technologies*.[1] Here, however, the Kaplans did not agree to submit *any* issue to the arbitrators for final decision, and therefore the Court of Appeals properly addressed arbitral jurisdiction independently. *See AT&T Technologies*, 475 U.S. at 649 ("Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.").

Petitioner complains that it is "extremely unfair" to permit a party contesting arbitral jurisdiction to obtain a *de novo* review of an arbitrator's jurisdictional decision after the arbitrator has ruled on the merits. Petition at 16. However, as the United States Court of Appeals for the Third Circuit pointed out in *Local 719, American Bakery & Confectionery Workers v. National Biscuit Co.*, 378 F.2d 918 (3d Cir. 1967), exactly the same result occurs where a party unsuccessfully challenges jurisdiction in federal district court — the Court of Appeals reviews the jurisdictional decision *de novo* after the district court renders its judgment on the merits:

> In our own federal litigation system we require no special jurisdictional appearances and permit no interlocutory appeals from a court's

1. Indeed, the United States Court of Appeals for the Third Circuit recently held that where the parties expressly *agreed* to arbitrate the question of arbitrability, deferential review of the arbitrator's determination of that question was appropriate. *Pennsylvania Power Co. v. Local Union No. 272 of the Int'l Bhd. of Elec. Workers*, 886 F.2d 46, 48 (3d Cir. 1989). As mandated by *AT&T Technologies*, courts in the Third Circuit review arbitrability determinations with deference only where "the parties clearly and unmistakably provide" that the question of arbitrability is for the arbitrator. *See AT&T Technologies*, 475 U.S. at 649.

> decision in favor of its jurisdiction. Since federal labor policy with respect to arbitration favors the establishment of a private juridical system, there is even less reason to make resort to interstitial judicial activity mandatory, when the possibility exists that a labor dispute can be settled without any use of the courts whatsoever. Thus, where as here the reluctant party has presented its objection to arbitrability to the arbitrator and has not thereafter clearly indicated its willingness to forego judicial review, we believe that the issue is sufficiently preserved for our subsequent inquiry.

Id. at 921-22 (footnotes omitted). *See also, Davis v. Chevy Chase Fin. Ltd.*, 667 F.2d 160, 168 (D.C. Cir. 1981) ("[W]e agree with the court in *Local 719* that such a rule [limiting judicial review of an arbitrator's determination of arbitrability] might actually *foster* litigation by requiring parties disputing arbitrability to seek 'interlocutory' review of jurisdictional rulings.").[2]

Moreover, Petitioner could have moved the federal district court to compel arbitration when the Kaplans objected to arbitral jurisdiction and refused to sign a submission agreement. *See* 9 U.S.C. § 4. Petitioner *chose* not to do so and, therefore, should not be heard to complain of any alleged "unfairness" resulting from the

2. The rule advocated by Petitioner would waste both arbitral and judicial resources. Instead of giving arbitrators a meaningful opportunity to recognize their lack of jurisdiction and dismiss an unauthorized arbitration without need for judicial intervention, Petitioner's rule would require a party opposing arbitrability either to litigate the jurisdictional issue exclusively in federal court or be bound by an arbitrator's erroneous assertion of jurisdiction. It makes far more sense to allow the arbitrators the chance to nip an unauthorized arbitration in the bud, and to involve the federal courts only if the arbitrators fail to acknowledge their lack of jurisdiction.

timing of the Court of Appeals' reversal of the arbitrators' erroneous assertion of jurisdiction over the Kaplans.

Petitioner does not, and cannot, deny that *AT&T Technologies* governs the determination of the appropriate standard of review of an arbitrator's determination of arbitrability. *See* Petition at 13. The parties disagree only as to whether, under the particular circumstances of this case, the Court of Appeals correctly determined that the Kaplans had not "clearly and unmistakably" agreed to submit the question of arbitrability to the arbitrators. *See AT&T Technologies*, 475 U.S. at 649. This is not the sort of dispute which merits the granting of a petition for a writ of certiorari. *See* Sup. Ct. R. 10.1.[3]

II.

THE COURT OF APPEALS PROPERLY REVIEWED *DE NOVO* THE DISTRICT COURT'S DENIAL OF THE PETITION TO VACATE THE ARBITRATION AWARD FOR WANT OF ARBITRAL JURISDICTION.

The Court of Appeals reviewed *de novo* the district court's denial of the Kaplans' petition to vacate the arbitration award for want of arbitral jurisdiction. App. A at 13. Such a standard of review is plainly appropriate. The district court did not hold an evidentiary hearing or make credibility determinations, but rather based its analysis on the arbitration record and stipulations of fact. App. C at 1-2. Therefore, the Court of Appeals had no reason to defer to the district court's denial of the petition to vacate.

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3. Moreover, because the circumstances of this case plainly demonstrate that the Kaplans did not agree to commit the jurisdictional issue (or *any* issue) to the arbitrators for final decision, the Court of Appeals properly made an independent determination of arbitrability.

The district court's procedure in addressing the parties' respective petitions to vacate or confirm the arbitration award was analogous to the consideration of cross-motions for summary judgment. *See Air Line Pilots Ass'n Int'l v. Aviation Assocs.*, 955 F.2d 90, 93 (1st Cir.), *cert. denied*, 112 S. Ct. 3036 (1992) ("Summary judgment is clearly an appropriate mode for the resolution of an action to enforce an arbitrator's award. . . . [T]he enforcement proceeding is by nature summary."). It follows that review by the Court of Appeals should likewise be analogous to that applied in reviewing summary judgment determinations; *i.e.*, *de novo*. *See Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1230 (3d Cir.), *cert. denied*, 114 S. Ct. 554 (1993).

Petitioner complains that the *de novo* standard of review "fails to give the appropriate level of deference to the decisions of arbitrators." Petition at 19. However, as demonstrated in section I., *supra*, the arbitrators' erroneous assertion of jurisdiction over the Kaplans was not entitled to any deference, because "the question of arbitrability . . . is undeniably an issue for *judicial* determination." *AT&T Technologies*, 475 U.S. at 649 (emphasis added).

Moreover, in reviewing *de novo* a district court's determination whether to vacate an arbitration award, the Court of Appeals merely puts itself in the shoes of the district court. *See* App. A at 13; *Moseley, Hallgarten, Estabrook & Weeden v. Ellis*, 849 F.2d 264, 267 (7th Cir. 1988). Therefore, where deference to arbitral determinations is appropriate, the Court of Appeals, like the district court, will defer. There is no cogent reason for the Court of Appeals to defer to the district court, rather than to the arbitrators themselves. *See Labor Relations Div. of Constr. Indus. v. International Bhd. of Teamsters, Local No. 379*, 29 F.3d 742, 745 (1st Cir. 1994) ("all deference is due to the arbitrator's interpretation of the contract, not to the interpretation of the district court").

Indeed, at least nine of the Circuits have already held that Courts of Appeal should review denials of petitions to vacate arbitration awards *de novo*. *See, e.g., Advest, Inc. v. McCarthy*, 914 F.2d 6, 8 (1st Cir. 1990); *In re Arbitration No. AAA 13-161-0511-85*, 867 F.2d 130, 131 (2d Cir. 1989); *Kaplan v. First Options of Chicago, Inc.*, 19 F.3d 1503, 1509 (3d Cir. 1994) (App. A at 13); *Amerada Hess Corp. v. SS Athena*, 1987 WL 37022, at *1 (4th Cir. Apr. 9, 1987) (unpublished decision); *McIlroy v. PaineWebber, Inc.*, 989 F.2d 817, 819-20 (5th Cir. 1993); *Moseley, Hallgarten, Estabrook & Weeden v. Ellis*, 849 F.2d 264, 267 (7th Cir. 1988); *Pack Concrete, Inc. v. Cunningham*, 866 F.2d 283, 284 (9th Cir. 1989); *Bowles Fin. Group, Inc. v. Stifel, Nicolaus & Co.*, 22 F.3d 1010, 1012 (10th Cir. 1994); *Parmac, Inc. v. I.A.M. Nat'l Pension Fund Benefit Plan*, 872 F.2d 1069, 1071 (D.C. Cir. 1989).

Petitioner suggests that this Court grant certiorari to adopt the "dual standard of review" set forth in *dicta* by the United States Court of Appeals for the Eleventh Circuit in *Robbins v. Day*, 954 F.2d 679, 681-82 (11th Cir.), *cert. denied sub nom. Robbins v. PaineWebber, Inc.*, 113 S. Ct. 201 (1992).[4] Petition at 21. That standard, however, unfairly stacks the deck in favor of arbitration, even where, as here, the parties never agreed to arbitrate their dispute. As the Eleventh Circuit itself has recognized,

> A duty to arbitrate does not arise because a court thinks it is a good thing to require in the circumstances or because national labor policy favors it. A party cannot be required to submit to arbitration a dispute that it has not agreed to arbitrate.

4. In *Robbins*, the court *held* that a *de novo* standard of review applied to the district court's order to vacate the arbitration award. 954 F.2d at 681. The court's statement that district court decisions denying vacatur would be reviewed for abuse of discretion is pure *dictum*. *See id.*

Road Sprinkler Fitters Local Union No. 669 v. Independent Sprinkler Corp., 10 F.3d 1563, 1567 (11th Cir.), *cert. denied*, __ S. Ct. __, 63 U.S.L.W. 3244 (1994) (*citing United Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 582 (1960)).

Because district courts' summary determinations are not entitled to deference on appeal, this Court should decline Petitioner's invitation to grant certiorari to upset the settled law of at least nine Circuits by adopting the Eleventh Circuit's dual standard of review.[5]

III.

THE COURT OF APPEALS CORRECTLY HELD THAT WHERE, AS HERE, THE PARTIES' AGREEMENTS AND CONDUCT PLAINLY NEGATE CONSENT TO ARBITRATE, STOCK EXCHANGE RULES ALONE DO NOT CONFER ARBITRAL JURISDICTION OVER "ASSOCIATED PERSONS" OF EXCHANGE MEMBERS.

The narrow and unremarkable holding of the Court of Appeals is that where, as here, the parties' agreements and conduct plainly *negate* consent to arbitrate, stock exchange rules alone do not

5. Even if it had adopted the Eleventh Circuit's dual standard of review, the Court of Appeals would have reached the same result, because by applying an incorrect legal standard to the arbitrators' jurisdictional determination, the district court abused its discretion. *See* App. A at 52 (district court applied incorrect standard of review to arbitrators' jurisdictional decision); *Harris v. Reeves*, 946 F.2d 214, 218 n.6 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 1516 (1992); *Institutionalized Juveniles v. Beal*, 758 F.2d 897, 926 (3d Cir. 1985) ("by applying an incorrect legal standard, the district court abused its discretion"). It would not be an efficient use of this Court's limited resources to choose between two standards of appellate review, both of which would lead to the same result in this case.

confer arbitral jurisdiction over "associated persons" of Exchange members. App. A at 36-40. As the Court of Appeals noted, "[t]he circumstances of this case plainly negate the Kaplans' consent to arbitrate their individual responsibility for MKI's obligations. . . . There is no ambiguity about the absence of any consent to arbitrate in the documents the Kaplans signed individually." App. A at 26-27.

Contrary to Petitioner's prophesies of doom, the decision of the Court of Appeals does not "threaten[ ] the entire structure . . . of self-regulation by national securities exchanges and associations." Petition at 22. In reality, the decision simply applies this Court's requirement that such organizations obtain *consent* before hauling "associated persons" of members into arbitration. *See AT&T Technologies*, 475 U.S. at 648-49 ("arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration").

Unable to point to any agreement by the Kaplans to arbitrate this dispute, Petitioner relies on Mr. Kaplan's purported status as an "associated person" of MKI under the rules of the Exchange in support of arbitral jurisdiction.[6] However, as the Court of Appeals held, the Exchange's rules *alone* do not create arbitral jurisdiction where the surrounding circumstances plainly *negate* an intention to arbitrate. App. A at 34 (*quoting Gateway Coal v. United Mine Workers*, 414 U.S. 368, 374 (1974) ("No obligation to arbitrate . . . arises solely by operation of law. The law compels a party to submit his grievance to arbitration only if he has contracted to do so.")).[7]

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6. First Options does not even contend that Mrs. Kaplan was an "associated person" of MKI, and offers *no* basis for the arbitrators' assertion of jurisdiction over her.

7. The Court of Appeals did *not* hold that independent evidence of consent to arbitrate is *always* required to compel "associated persons" to arbitrate their (Cont'd)

As the Court of Appeals observed, "[m]ost of the cases that have considered whether persons associated with members of an exchange must arbitrate a dispute . . . have required evidence other than the rule itself to show the associated person's consent to arbitrate." App. A at 37; *see, e.g., Haviland v. Goldman, Sachs & Co.*, 947 F.2d 601, 604 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 1995 (1992) (arbitration not required unless dispute falls within scope of *both* signed U-4 agreement *and* Exchange arbitration provisions); *Fleck v. E.F. Hutton Group, Inc.*, 891 F.2d 1047, 1049 (2d Cir. 1989) (relying on agreement in signed U-4 to abide by Exchange arbitration rules);[8] *Pearce v. E.F. Hutton Group, Inc.*, 828 F.2d 826, 830 (D.C. Cir. 1987) (same as *Haviland, supra*); *Chisolm v. Kidder, Peabody Asset Management, Inc.*, 810 F. Supp. 479, 481 (S.D.N.Y. 1992) (signing of U-4 form rendered plaintiff subject to Exchange arbitration rules); *Morgan v. Nikko Securities Co.*, 691 F. Supp. 792, 796-97 (S.D.N.Y. 1988) (Exchange arbitration rule inapplicable absent signed U-4); *Francis v. Marshall*, 661 F. Supp. 773, 774 & n.1 (D. Mass. 1987) (relying on signed U-4).

Here, however, "[n]o U-4 Form nor any other document signed by Mr. Kaplan shows he had agreed to arbitrate. . . ." App. A at 39-40. Therefore, the Court of Appeals held:

> We do not think Exchange Rule 950 § 6(a)(2) requires Mr. Kaplan to arbitrate the

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(Cont'd)
disputes with Exchange members. (Such a holding would be consistent with the law. *See* cases cited at 15, *infra*. The facts of this case, however, do not present the issue.) It held only that where, as here, the surrounding circumstances clearly *negate* consent to arbitrate, Exchange rules governing "associated persons" do not alone confer arbitral jurisdiction. App. A at 37.

8. First Option contends that the *Fleck* court did not rely on the existence of a signed U-4 agreement. Petition at 26 n.21. That contention, however, is incorrect. *See Fleck*, 891 F.2d at 1049.

> dispute with First Options over the workout absent other evidence that he has individually agreed to submit to arbitration this particular dispute over his continuing individual responsibility for MKI's obligations. The workout documents themselves not only fail to furnish that evidence, they negate his consent to arbitration. *Because of the nature of this particular dispute and the terms of the workout documents that govern it, we conclude Mr. Kaplan was not required to arbitrate this matter.*

App. A at 37 (emphasis added, footnote omitted).

Under the circumstances of this case, the Court of Appeals correctly found that the Kaplans did not consent to arbitration solely by operation of Exchange Rule 950 § 6(a)(2). There is no necessity for this Court to reconsider this narrow, fact-bound, and eminently reasonable holding.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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